Supreme Court, U.S.
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No. 96-989

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAIME CASTILLO,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# REPLY BRIEF FOR THE PETITIONER

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## Counter Statement of Facts

The government has presented a rather debatable rendition of the facts concerning petitioner Castillo (US Br. 6) and the entire Waco tragedy. Yet the jury heard Castillo's statement that when Koresh, who was unarmed, opened the front door and yelled out, "There's women and children in here," shots were suddenly fired at the front door, wounding Koresh. (Trial Transcript ["TR"] 3094.) The jury also heard ample evidence of agents wildly firing into the walls of the house and of residents being shot dead, including one women who was killed as she slept. After hearing this evidence, the jury acquitted all of the defendants of conspiracy to murder and of aiding and abetting murder.

The jury heard evidence that Castillo held a rifle or pistol on three occasions, but heard no evidence that he ever fired a shot. He saw and heard about other residents who had been shot dead. When the truce was called, Castillo stood in a doorway, where agents could have shot him, and allowed the agents to retrieve a wounded man.

Once the cease fire was called, peace prevailed the rest of the day and for several weeks. On April 19, the FBI Rambos prevailed over the negotiators. More CS gas was pumped into the buildings at men, women, and children than ever before in the annals of gas attacks. The tanks ran into the buildings and caused walls to collapse. (TR 5064-71, 5591-5614) Numerous deaths of children and females were from suffocation or blunt injury caused by the tanks demolishing parts of the building. (TR 5963-64, 5979, 6020-21, 6042-43)

The government asserts that Texas Rangers found a hand grenade in the vest that Castillo took off when he escaped from the burning building. Not one of the pages cited by the government offer proof that Castillo had a grenade. (Castillo C.A. Reply Br. 4 & n. 2.) In any event, Castillo was charged for carrying or using a firearm on February 28, not April 19. No evidence exists that Castillo carried or used an enhanced weapon at any time.

The government paints with a broad brush about Koresh's religious rhetoric, but no evidence existed that Castillo had any unlawful purposes. The government's entire case against Castillo was built on guilt by association and on presence at the scene of the tragedy.

## ARGUMENT

### I. THIS COURT SHOULD DECIDE WHETHER AS A MATTER OF STATUTORY TEXT, CONVICTION UNDER § 924(C) REQUIRES CONVICTION OF THE PREDICATE OFFENSE

"We start, as we must, with the language of the statute." *Bailey v. United States*, 116 S.Ct. 501, 506 (1995). The government would look at the statutory text in isolation, even breaking up the first sentence of § 924(c)(1) and supplying a period where it does not exist. (Br. 17-18) The sentence does not end with the words "uses or carries a firearm," and instead continues, "shall, *in addition to the punishment provided for such crime of violence or drug trafficking crime* . . . ." That additional statutory language is not written in the form of a mere possibility, as if following the above italicized portion it read, "if convicted of such crime . . . ." Instead, it is written as an element that has

been fulfilled in fact--the defendant actually was convicted of and received punishment for the predicate crime.

Moreover, the last clause of the last sentence of § 924(c)(1) is also written as an element which presupposes conviction of the predicate offense--it prohibits a concurrent sentence of imprisonment "including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." That is hardly the language of an optional condition.

This Court's words in *Bailey*, 116 S.Ct. at 506-07, are apropos:

> We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. . . . We read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning. "Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.

The government cites cases from six circuits holding that conviction of § 924(c) does not require conviction of the predicate offense. (Br. 17) None of these decisions bother to analyze the statutory text as a whole.

The government only begs the question when it quotes the snippet from *United States v. Gonzalez*, No. 95-1605 (Mar. 3, 1997), slip op. 8 ("When a defendant violates § 924(c), his sentencing enhancement under that statute must run consecutively to all other prison terms."). That language does not address when a defendant actually violates this provision.

Given that most circuit opinions are in clear conflict with the textual language of § 924(c), and in view of the large number of prosecutions under that provision, the issue is a significant question of federal law which this Court should decide.

## II. GIVEN THE CIRCUIT CONFLICT, THIS COURT SHOULD DECIDE WHETHER THE INDICTMENT MUST ALLEGE, AND THE JURY MUST FIND, USE OF A MACHINEGUN

The government concedes that the Fifth Circuit is in conflict with the First, Sixth, and Ninth Circuits. (Br. 20-22) Only in the former can a defendant be indicted for and found guilty of use of a "firearm," a 5-year offense, and then be blindsided without warning by the sentencing judge as if such person was convicted of a "machinegun," a 30-year offense. By contrast, the latter circuits require the prosecution to allege and prove use of a machinegun.

The disparate consequences are so extreme that this Court should resolve the circuit conflict as soon as possible. It will not assist judicial economy to delay resolution of this issue to after defendants here are resentenced to thirty years. While theoretically they could be sentenced to five years, the Court of Appeals has already asserted that ample evidence exists in the record that defendants qualify for the thirty-year sentence. (App. 86a) The legal issue involved is the same now as it will be after the inevitable thirty-year sentences are reimposed.

This Court should also nip in the bud now, rather than later, the government's unprecedented attempt to allow the sentencing judge to usurp the jury's function recognized in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946).

(Br. 23-25) The government sees "no reason why *Pinkerton* principles should not apply in that [sentencing] context." (Br. 23 n. 13) Once again, defendants are to be indicted for and convicted of use of "firearms," and then taken by surprise with allegations at sentencing, based only on a preponderance of evidence, that "machineguns" were used, and used by someone else at that, without even the defendant's knowledge.

The government argues that "if the district court on remand applies *Pinkerton* in sentencing them," defendants can appeal and then can petition for certiorari again. (Br. 25) The district court has already done so once, and there is nothing to suggest that it will not do so again. Requiring defendants to go through fruitless appeals again will not promote judicial economy. This Court should resolve now the government's unprecedented attempt to transform *Pinkerton* from a jury function to a sentencing court function.

## CONCLUSION

This Court should grant this petition for a writ of certiorari.

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